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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C.**

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| AMENDMENT OF PARTS 2 AND 25 OF THE COMMISSION'S RULES TO PERMIT OPERATION OF NGSO FSS SYSTEMS CO-FREQUENCY WITH GSO AND TERRESTRIAL SYSTEMS IN THE KU-BAND FREQUENCY RANGE AND AMENDMENT OF THE COMMISSION'S RULES TO AUTHORIZE SUBSIDIARY TERRESTRIAL USE OF THE 12.2-12.7 GHZ BAND BY DIRECT BROADCAST SATELLITE LICENSEES AND THEIR AFFILIATES | ) | ET Docket No. 98-206<br>RM-9147<br>RM-9245 |



## COMMENTS OF TELEDESIC LLC

Teledesic LLC submits these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in this proceeding.[1] As the Commission considers the many questions at issue, we encourage it to keep two fundamental principles in mind. First, service providers require regulatory *stability*. The current processing round will be difficult under any circumstances, but no solution is possible unless operators know that once this first round is over, all subsequent applicants must demonstrate their ability to protect previously licensed systems from harmful interference. Second, service providers need *flexibility*. Although the obligations associated with a Commission license should be clear, they should not be unnecessarily constraining. To the extent

[1] *NPRM*, FCC 98-310 (rel. November 24, 1998).

possible, rules must accord service providers the flexibility both to develop innovative system designs and to change their plans.

For these reasons, the Commission should (1) make clear that subsequent applicants for Ku-band NGSO FSS licenses must demonstrate their ability to avoid harmful interference to operators who are licensed in the first processing round; and (2) abandon its proposal to impose a rigid distinction between "gateway" and "service" links in discrete portions of the band.

## I. Subsequent Applicants Must Be Required to Protect NGSO FSS Systems Licensed in This Processing Round

The Commission states in the *NPRM* that it expects "all NGSO FSS applicants to bear some portion of the technical and operational constraints necessary to accommodate multiple NGSO FSS systems."[2] Although this makes perfect sense as applied to the applicants in the first processing round, it cannot be taken as an adequate demarcation of the rights of first-round licensees vis-à-vis later applicants.[3]

NGSO FSS systems are of extremely complex design and cost billions of dollars. Potential satellite operators and their investors cannot commit to such projects if they are subject to an indeterminate legal regime. As the Commission has consistently recognized by requiring new entrants to protect licensed systems, satellite operators need to know their rights in order to plan for future operation. In particular, NGSO FSS

[2] *NPRM*, at ¶ 70.

[3] It is also not clear that it would serve any useful purpose to consider subsequent applications in a "processing round." Since the central issue for any subsequent application is its compatibility with previously licensed systems, the public interest might best be served by considering each such application in the order in which it is filed.

licensees in the Ku band must be assured that they will not be forced to significantly alter their networks to accommodate systems licensed in some future processing round.

In the NPRM, the Commission requests comment "on whether the potential NGSO FSS licensees that could be licensed as a result of an initial processing round should have any responsibility for accommodating subsequent NGSO FSS applicants."[4] The answer dictated by both precedent and policy is that once the applicants in the current processing round receive their licenses in accordance with a sharing plan endorsed by the Commission, they will not be forced to adopt new technical parameters to accommodate new entrants. Like all other satellite services, NGSO FSS licensees should not be forced to *significantly alter* their systems or services to accommodate applicants from later processing rounds. As the very concept of the processing round implies, future applicants from subsequent rounds must protect licensees, and the Commission should make this clear.

Any other rule would contradict unbroken Commission precedent. In the *DISCO II Report and Order*, for example, the Commission reiterated its basic approach: applicants, be they foreign or domestic, may not force licensees to "significantly alter" their systems.[5] This approach has been the norm across all satellite services. For example, applicants in the 1.6/2.4 GHz Mobile Satellite ("Big LEO") Service have been required to demonstrate that their proposals "will not cause unacceptable interference to other authorized users of the spectrum."[6] Applicants in a first processing group "are

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[4] *NPRM*, at ¶ 70.

[5] Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, *Report and Order*, 12 F.C.C. Rcd. 24094 (1997) *("DISCO II Report and Order")*, at ¶ 150.

[6] 47 C.F.R. § 25.143(b)(2)(iv).

insulated from any mutual exclusivity that may arise" due to applications in later processing groups.[7]

The Commission's approach to promoting multiple entry and competition in the non-voice, non-geostationary mobile-satellite ("Little LEO") service also illustrates the usual distinction drawn between licensees and applicants. As part of their system application, new entrants must demonstrate "that they will not cause unacceptable interference to any [Little LEO] system authorized to construct or operate."[8] Although the Commission expects Little LEO licensees to use their best efforts to *coordinate* with new entrants, the burden of designing a system that is capable of sharing with already-licensed operations falls first and foremost on the later applicants.[9]

In addition to this well-settled domestic policy of first come, first served, the Commission's obligations under the General Agreement on Trade in Services ("GATS") regarding basic telecommunications services mandate that the Commission distinguish licensees from applicants. In *DISCO II*, the Commission stated that when a request from a foreign licensee to use U.S. spectrum resources would pose "debilitating interference problems or where the only technical solution would require U.S.-licensed systems to *significantly alter their* operations[,]" it would "impose technical constraints on the foreign system's operations in the United States or, in cases where any such

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[7] Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Band, *Memorandum Opinion and Order*, 11 F.C.C. Rcd. 12861, 12874, at ¶ 36 (1996).

[8] 47 C.F.R. 25.142(a).

[9] See 47 C.F.R. § 25.142(b)(3) (Little LEO licensees shall at the Commission's direction attempt to coordinate with new entrants, except that they are not obligated to suggest changes to or re-engineer an applicant's proposal).

measures would be insufficient to remedy the technical problem, *deny the request.*"[10] If the Commission will not force a U.S. licensee to significantly alter its operations for a foreign-licensed applicant, then it would be discriminatory to require the same U.S. licensee to make significant alterations for a U.S. applicant. According a U.S. applicant more favorable treatment than the foreign one would violate the equal treatment obligations imposed by the GATS and the WTO Agreement.[11]

In addition, the Radio Regulations of the International Telecommunications Union ("ITU") provide that new assignments should not cause harmful interference to systems licensed by other administrations.[12] Therefore, if the Commission were to adopt a rule that existing licensees must significantly alter their systems to accommodate new entrants, it could only apply its rule to domestic licensees. This is perhaps the most perverse consequence of treating applicants and licensees on equal footing. If a foreign system were notified to the ITU and recorded in the Master International Frequency Register, it would be contrary to the ITU Radio Regulations for the Commission to authorize any new station that would cause harmful interference to that foreign system. Therefore, the Commission could only require major operational concessions from

[10] *DISCO II Report and Order,* at 24159, ¶ 150 (emphasis added).

[11] Uruguay Round of Multilateral Trade Negotiations: General Agreement on Trade in Services, Article XVII ("requiring that the United States accord "services and service suppliers of any other Member . . . treatment no less favorable than it accords its own like services and service suppliers"); Reference Paper on Basic Telecommunications Services, Article 6 ("Any procedures for the allocation of scarce resources . . . will be carried out in [a] . . . non-discriminatory manner").

[12] "Any new assignment or any change of frequency or other basic characteristic of an existing assignment . . . shall be made in such a way as to avoid causing harmful interference to services rendered by stations using frequencies assigned in accordance with the Table of Frequency Allocation in this Chapter and the other provisions of these Regulations, the characteristics of which assignments are recorded in the Master International Frequency Register." ITU Radio Regulations, Art. S4.3.

*domestic* licensees to accommodate later applicants. Such an approach would devalue all U.S. satellite licenses and undermine the interests of the United States.

Presumably, the Commission does not intend to use this proceeding to self-inflict such a wound. If that presumption is correct, the Commission should clarify that an NGSO FSS licensee, like any other FCC licensee,[13] is protected from harmful interference *once its license is granted.* Although licensees may be required to share information with new entrants and even make minor system adjustments to accommodate them, later entrants must have the primary obligation to avoid harmful interference.

## II. The Commission Should Not Micromanage NGSO FSS use of the "Gateway Bands"

The Commission should not adopt its proposal to restrict use of NGSO FSS gateway bands to "earth station operations that are not intended to originate or terminate traffic but are primarily intended for interconnecting to other networks."[14] By regulating the *function* of the terminals rather than their radiofrequency characteristics, this proposal would constrain NGSO FSS operations in remote areas without benefiting the public or any other service. For example, the restriction certainly does not make sense when applied to networks using terminating and interconnecting earth stations

[13] The Commission has required entrants to protect licensees since it began regulating the airwaves, see *National Broadcasting Co. v. United States,* 319 U.S. 190 (1943); *Midnight Sun Broadcasting Co.,* 11 F.C.C. 1119 (1947); *Sudbrink Broadcasting of Georgia, Inc.,* 65 F.C.C. 2d 691, 692 (1977).

[14] *NPRM,* at ¶ 15.

with equivalent technical characteristics that satisfy the requirements established for the gateway bands.

When possible, the Commission should avoid mandating the particular uses that a service makes of its allocation. No legitimate goal is served by prohibiting NGSO FSS operators from deploying "service links" that comply with the technical parameters established for the "gateway bands." Therefore, the Commission should permit service link operation in all the bands it allocates to NGSO FSS, subject only to the technical sharing rules applicable to those bands.

In the NPRM, the Commission suggests certain technical rules for the gateway bands. These rules include geographical restrictions,[15] site-by-site coordination,[16] and minimum antenna size requirements.[17] If an NGSO FSS operator is capable of deploying a service link that complies with all the adopted requirements, the Commission should permit the deployment of that service link. It would be a prime example of unnecessary command and control regulation for the Commission to prevent the deployment even though the link complied with the Commission's technical rules designed to minimize interference. In short, the Commission should adopt a spectrum policy, not dictate system designs. Satellite companies — not the Commission — ought to be in the business of deciding how to use their earth terminals.

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[15] *Id*, at ¶ 24. .

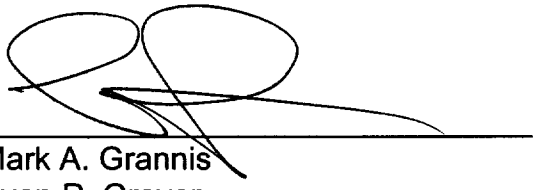
[16] *Id*, at ¶¶ 22, 34.

[17] *Id*, at ¶ 42.

## III. Conclusion

As the Commission adopts rules for NGSO FSS operation in the Ku band, it is important that it embrace fundamental principles of sound regulation. In particular, it should strive to promote a stable yet flexible regulatory environment. It will do that by affirming that it does not intend to undermine years of precedent by forcing licensees to significantly alter their systems to accommodate new entrants, and by adopting a sharing policy that avoids micromanagement. By letting licensees know what they have and allowing them to decide how to use it, the Commission will encourage efficient use of the nation's spectrum resource.

Respectfully submitted,



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